

The Role of Conciliation in Resolving Disputes: A P.R.C. Perspective

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I. INTRODUCTION

Conciliation is the process by which the participants—together with the assistance of a neutral person or persons—systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.¹ Conciliation has a long history in China because it emphasizes the necessity of avoiding conflict, observing proper rules of behavior, and relying on the social group to resolve differences,² which are in conformity with Confucian standards and values.³ In China,⁴ conciliation can be divided into five categories: administrative conciliation, people's conciliation, conciliation conducted by permanent conciliation centers, conciliation conducted in the litigation process, and conciliation conducted in the arbitration process.⁵ At present,

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¹ JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING DISPUTES WITHOUT LITIGATION* 7 (1996). The term "mediation" is often used interchangeably with "conciliation"; in this paper, the terms will be treated as synonymous.

² STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* 26 (1999).

³ The main Confucian values are praise of harmony, moderation in all things, concession or yielding, and avoidance of litigation. All those principles of Confucianism promoted a culture in which conciliation was considered to be the first resort of resolving disputes. In regards to Confucian philosophy, see generally LIU SHUXIAN, *UNDERSTANDING CONFUCIAN PHILOSOPHY: CLASSICAL AND SUN-MING* (1998).

⁴ In this article, "China" is used interchangeably with "the P.R.C."

⁵ The categories of Chinese conciliation may be different according to different criteria. For example, according to Wang Shengchang, conciliation in China may be divided into ad hoc conciliation, conciliation by permanent conciliation centers, joint conciliation by two conciliation centers, combination of arbitration and conciliation, and combination of conciliation and litigation. See WANG SHENCHANG, *RESOLVING DISPUTES IN THE P.R.C.: A PRACTICAL GUIDE TO ARBITRATION AND CONCILIATION IN CHINA* 33 (1996). Conciliation in China is also divided into people's conciliation (*minjian tiaojie*), commercial conciliation (*shangshi tiaojie*), administrative conciliation (*xingzheng tiaojie*), and judicial conciliation (*sifa tiaojie*), including conciliation in litigation and conciliation in arbitration. See ZHONGGUO SHANGSHI TIAOJIE: LILUN YU SHIWU

conciliation plays an important role in resolving disputes arising from almost all areas of Chinese society.⁶

This article is divided into seven parts: Parts II and III briefly introduce the administrative conciliation and the people's conciliation in the People's Republic of China (P.R.C.), respectively; Part IV presents the organization and characteristics of China's institutional conciliation; Part V discusses China's practice of combining litigation with conciliation, considering the history and legislation of this practice; Part VI introduces China's practice of combining arbitration with conciliation, presenting its forms, contents and principles; and Part VII analyzes the reasons for emphasizing conciliation in China, probing into the particular reasons for developing the combination of conciliation with arbitration.

II. ADMINISTRATIVE CONCILIATION

Administrative conciliation is conducted by the administrative bodies, within their authorities according to the law, for the purpose of resolving disputes. Generally, two organs in China conduct administrative conciliation: the basic-level people's governments and the administrative organs.⁷ The administrative conciliation can be utilized in China to resolve civil disputes, commercial disputes, and some slightly criminal disputes.⁸ In conducting conciliation, administrative organs must follow the principles of fairness, reasonableness, lawfulness, and voluntary participation.⁹

Administrative conciliation usually should be conducted in accordance with particular administrative regulations. For example, according to the *Measures of Using Administrative Conciliation to Resolve Contract*

[COMMERCIAL CONCILIATION IN CHINA: THEORY AND PRACTICE] 4 (Conciliation Center of CCPIT & CCOIC ed., 2002).

⁶ The disputes include commercial and civil disputes, industrial and labor disputes, family disputes, community and neighborhood disputes, and agricultural contractor's contract disputes arising within the agricultural collective economic organizations.

⁷ At present, the organizational system of local government of the P.R.C. is divided into four levels: provincial, city, county, and village (town) levels. Basic-level refers to the county and village (town) levels.

⁸ Under the Chinese legal system, civil disputes refer to disputes such as marital disputes, adoption disputes, guardianship disputes, and support and succession disputes; commercial disputes refer to disputes arising from economic and trade transactions which are either contractual or non-contractual in nature.

⁹ The four principles are also emphasized in other types of conciliation in China. More discussion will be presented in the following Parts of the article.

Disputes,¹⁰ the administrative organs for industry and commerce may conciliate the disputes arising from the contracts conducted by Chinese legal persons, physical persons and/or other economic organizations. However, if a court or arbitration commission accepted a dispute, or if the other party to a dispute refuses to conciliate the dispute, the administrative organ then cannot conduct conciliation to resolve the dispute.¹¹ Additionally, the administrative departments of traffic and public safety may conciliate disputes arising from traffic accidents,¹² the administrative departments of health may conciliate the disputes arising from medical accidents,¹³ and the administrative departments of marital registration may conciliate disputes of divorce.¹⁴

III. PEOPLE'S CONCILIATION

A. History

The people's conciliation system was formally established in 1954 when the Government Administration Council issued the *Provisional Organic Rules of Peoples' Conciliation Commission*.¹⁵ Because of government encouragement, by the end of 1955, 70% of the villages, towns, and neighborhoods in China established the organizations of people's conciliation, and there were more than one million conciliators spreading all over the country.¹⁶ Since the people's conciliation developed rapidly and played an important role in resolving disputes, the former Chairman of the

¹⁰ This regulation was issued by the Administrative Department of Industry and Commerce and came into force on November 3, 1997.

¹¹ MEASURES OF USING ADMINISTRATIVE CONCILIATION TO RESOLVE CONTRACT DISPUTES art. 8 (P.R.C.).

¹² LAW ON THE SECURITY OF ROAD AND TRAFFIC art. 74 (P.R.C.). Accordingly, the disputants may ask the department of traffic administration to conciliate the dispute, or they may directly file a civil litigation to the court.

¹³ REGULATIONS ON DEALING WITH MEDICAL ACCIDENTS art. 46-49 (P.R.C.).

¹⁴ MARRIAGE LAW OF THE P.R.C. art. 32 (P.R.C.).

¹⁵ The Government Administration Council was the predecessor of the State Council. The State Council, or the Central People's Government of the P.R.C., is the executive body of the highest organ of state power and the highest organ of state administration.

¹⁶ The Chinese government has encouraged people's conciliation since it was established in 1949. Today, people's conciliation has been considered an important and effective method of resolving disputes.

P.R.C., Liu Shaoqi,¹⁷ described such conciliation as “the first line of defense of the political-legal works.”¹⁸ The “first line of defense” collapsed during the “Great Cultural Revolution” (1966–1976)¹⁹ and was rebuilt in 1978, when China began its open reform policy.²⁰

B. Law and Rules

The Constitution of the P.R.C. confirmed the legal status of people’s conciliation in 1982. Article 111 of the Constitution states:

The residents’ committees and villagers’ committees established among urban and rural residents on the basis of their place of residence are mass organizations of self-management at the grass roots level. The chairman, vice-chairman of each residents’ or villagers’ committee are elected by the residents. The relationship between the residents’ and villagers’ committees and the grass-roots organs of state power is prescribed by law.

The residents’ and villagers’ committees *establish subcommittees for people’s conciliation*, public security, public health and other matters in order to manage public affairs and social services in their areas, *conciliate*

¹⁷ Liu Shaoqi (1898–1969) was a Chinese communist politician and fought as part of communist forces in China during struggles against the Kuomintang and Imperial Japanese forces. He later held the position of Chairman of the People’s Republic of China. The Encyclopedia of Marxism, at <http://www.marxists.org/glossary/frame.htm> (last visited Aug. 22, 2004).

¹⁸ See Li Bin, *Zai Gaige Kaifang zhong Fazhan Wanshan Zhongguo Renmin Tiaojie Zhidu* [Developing and Perfecting the People’s Conciliation System in the Process of Opening and Reforming], in 4 CHINA JUDICATURE (1999).

¹⁹ During that time, the Chinese legal system was under attack, legal professionals were persecuted, and law took a back seat to politics. See RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 45 (2002).

²⁰ Chinese economic reform refers to the program of economic changes in the P.R.C., led by Deng Xiaoping, which was started in 1978 and is still ongoing. The first reforms in the late 1970s and early 1980s consisted of opening trade with the outside world, instituting the contract responsibility system in agriculture, and establishing township village enterprises. The reforms of the late 1980s and early 1990s focused on creating a pricing system and decreasing the role of the state in resource allocations. The reforms of the late 1990s focused on closing unprofitable enterprises and dealing with insolvency in the banking system. See *Chinese Economic Reform*, at http://www.wordiq.com/definition/Chinese_economic_reform (last visited Aug. 22, 2004).

civil disputes, help maintain public order and convey residents' opinions and demands[,] and make suggestions to the people's government.²¹

In 1989, the State Council promulgated the *Organic Rules of People's Conciliation Committee*. Accordingly, these Rules stated that the people's conciliation committees shall conciliate civil disputes in accordance with laws, regulations, rules and policies, and, in the absence of definite provisions in laws, regulations, rules, and policies, the people's conciliation committees shall conduct conciliation in accordance with the social morals.²² The people's conciliation committees may either conduct conciliation on the basis of the application of the parties or at the committees' own initiative without the application; nevertheless, they shall conciliate disputes on the basis of the willingness of the parties.²³ The people's conciliation committees do not charge for conciliating civil disputes.²⁴

C. Statistics

Until the end of 1998, there had been 987,000 people's conciliation committees and 10 million conciliators in China.²⁵ From 1980 to 1998, people's conciliation committees conciliated 127.8 million disputes, which was equivalent to 5.3 times the civil cases for the first instance accepted by

²¹ XIANFA art. 111 (1982) (emphasis added). The Fifth Session of the Fifth National People's Congress of China promulgated a new Constitution in 1982 (the fourth Constitution of the P.R.C.). Before the 1982 Constitution, there were the 1954, 1975, and 1978 Constitutions. The 1982 Constitution was implemented by the proclamation of the National People's Congress on December 4, 1982. Since then, the P.R.C. Constitution has been amended four times. It was first amended at the First Session of the Seventh National People's Congress on April 12, 1988. In 1993, the Constitution was amended at the First Session of the Seventh National People's Congress on March 29. In 1999, the Constitution was amended at the Second Session of the Ninth National People's Congress on March 15. In 2004, the Constitution was amended again at the Second Session of the Tenth National People's Congress on March 14.

²² ORGANIC RULES OF PEOPLE'S CONCILIATION COMMITTEE art. 6 (P.R.C.).

²³ *Id.*

²⁴ *Id.* at art. 11

²⁵ Li, *supra* note 18. Other sources show different figures. For example, according to Xiao Xiaogan, at the end of 2000, there had been 963,000 people's conciliation committees and 8.44 million conciliators in China. See Xiao Xiaogan, *Zhuanxin Shiqi Renmin Tiaojie Zhidu de Gaige yu Wanshan [Reforming and Perfecting the System of People's Conciliation in the Period of Transition]*, at <http://www.dffy.com> (last visited Aug. 22, 2004).

the basic-level people's courts during the same period.²⁶ In 2000, the people's conciliation committees in China conciliated 5.02 million civil disputes; among those cases, 4.76 million civil disputes were conciliated successfully, with the rate of success of conciliation reaching 94.8%.²⁷

A survey of Haidian Street Business Office, which is a model organ of people's conciliation, shows that in 1999, 42% of the cases resolved by people's conciliation were family disputes, 47% were neighbor disputes, and 11% were other disputes. Among those cases, 62% of the parties were older than 50 years old, 28% were middle age (30 to 50 years old), and only 1% were youth (younger than 30 years old). According to the survey, 95% of disputes were resolved successfully by people's conciliation and 90% of conciliation settlements were enforced voluntarily.²⁸

IV. INSTITUTIONAL CONCILIATION

A. CCPIT/CCOIC Conciliation Network

The Conciliation Centers of the China Council for the Promotion of International Trade (CCPIT)/China Chamber of International Commerce (CCOIC) (CCPIT/CCOIC Conciliation Centers) are permanent conciliation institutions in China, which independently and impartially assist disputing parties in settling their disputes arising from commercial, maritime, and other businesses.²⁹ The first CCPIT/CCOIC Conciliation Center was established in Beijing in 1987 under the name CCPIT Beijing Conciliation Center. Since then, CCPIT/CCOIC set up more than 30 conciliation centers within its sub-

²⁶ Li, *supra* note 18.

²⁷ Xiao, *supra* note 25.

²⁸ Yang Na, *Renmin Tiaojie Zhidu de Xianzhuang Fenxi* [Analysis on the Present Situation of the People's Conciliation System], LEGAL DAILY, Sept. 24, 2000, at 2.

²⁹ Established in May 1952, China Council for the Promotion of International Trade (CCPIT) is the most important and the largest institution for the promotion of foreign trade in China. Its aims are to operate and promote foreign trade, to use foreign investment, to introduce advanced foreign technologies, to conduct activities of Sino-foreign economic and technological cooperation in various forms, to promote the development of economic and trade relations between China and other countries and regions around the world, and to promote the mutual understanding and friendship between China and peoples and economic and trade circles of all nations around the world, in line with law and government policies of the P.R.C. With the approval of the Chinese government, the CCPIT started to adopt a separate name—China Chamber of International Commerce (CCOIC)—in 1988, which is used simultaneously with the CCPIT. See *Nature and Functions of China Council for the Promotion of International Trade*, at <http://www.ccpit.org> (last visited Aug. 22, 2004).

councils in various provinces, municipalities, and major cities in China, and has created a country-wide conciliation network. Each of the CCPIT/CCOIC Conciliation Centers has one chairman, with several vice chairmen advisers, and a secretariat that is under the leadership of its Secretary General to take the charge of administrative and daily routine work. Every Conciliation Center maintains a Panel of Conciliators for parties to choose their conciliators,³⁰ but applies uniform conciliation rules, *i.e.* the CCPIT/CCOIC Conciliation Rules. By the end of 2003, the conciliation network has handled a cumulative caseload of more than 4,000 cases, with a successful rate of conciliation of 80% or more.³¹ Parties involved spread over more than 30 countries and regions.³²

The conciliation network pays great attention to cooperation with corresponding international conciliation institutions. In 1987, the CCPIT/CCOIC Conciliation Center entered into a Joint-Conciliation Cooperation Agreement with the Beijing-Hamburg Conciliation Center and worked out with the latter a detailed set of Joint-Conciliation Rules. Later, the Conciliation Center signed similar cooperation agreements with Argentine-China Conciliation Center and the New York Mediation Center respectively. The CCPIT/CCOIC Conciliation Center joined the International Federation of Commercial Arbitration Institutions (IFCAL) in 1995 and signed an Agreement for Cooperation in Conciliation with the London Court of International Arbitration (LCIA) in 1997.³³

The conciliators on the Panel are selected and appointed by CCPIT/CCOIC and its sub-councils from among just and upright personages with special knowledge and/or practical experience in economics, trade, finance, security, investment, intellectual property, technology transfer, real estate, construction contracts, transportation, insurance, and other fields of commerce, maritime business, and/or law.³⁴ When conciliating disputes, the

³⁰ CONCILIATION RULES OF CCPIT/CCOIC CONCILIATION CENTERS arts. 6 & 7 (P.R.C.) [hereinafter CONCIL. R.].

³¹ Interview with Mr. Huang, Vice-Chairman and Secretary-General, Conciliation Centers of the CCPIT/CCOIC (Nov. 11, 2004).

³² See *Settlement of Disputes*, at <http://www.cmac.org.cn/BCC/a42.html> (last visited Aug. 22, 2004).

³³ The CCPIT/CCOIC sub-councils' conciliation centers are also actively making contacts and establishing cooperation relations with conciliation organizations throughout the world.

³⁴ There are more than 350 experts on the Panel of Conciliators of the Conciliation Center of CCPIT/CCOIC, which is effective as from October 1, 2003. Among them, there are five coming from Hong Kong, three from the U.K., two from the U.S. and

conciliators must respect party autonomy and conduct conciliation "on the basis of ascertaining facts, distinguishing right from wrong[,] and determining liabilities while respecting the terms of contract, abiding by the law, following international practice[,] and adhering to the principle of being just, fair, and reasonable in order to bring about mutual understanding and mutual concession between the parties and help the parties reach an amicable settlement thereof."³⁵

The conciliators of the CCPIT/CCOIC Conciliation Centers are required to abide by the Ethical Codes for Conciliators (effective Jan. 1, 1992). According to the Ethical Codes, the conciliators of the CCPIT/CCOIC Conciliation Centers are not to represent either party,³⁶ shall conciliate cases in accordance with the procedures provided by the Rules of Conciliation,³⁷ and draw up a conciliation plan beforehand.³⁸ In the course of conciliation, conciliators shall be patient and cautious to conciliate the case,³⁹ and shall be impartial to either party in their speech or conduct.⁴⁰ If conciliation succeeds, conciliators shall make a Conciliation Statement in time; if conciliation fails, conciliators shall terminate the conciliation proceedings, and the parties shall be notified in writing in due course.⁴¹ Conciliators must keep strict confidentiality, not disclosing any information relating to the substance or procedure of the case.⁴² Particularly, the Ethical Codes require that anyone who has provided an advisory opinion on the substantive issues of the case to a party before the party applies for conciliation shall not be appointed as a conciliator of the case.⁴³ Conciliators, after the conciliation fails, shall not act as arbitration agents of either party in subsequent arbitration proceedings.⁴⁴ However, the conciliator may be appointed by one of the parties as arbitrator

Korea, respectively, and one from Germany, Canada, Singapore, France, Taiwan, and Macao, respectively.

³⁵ CONCIL. R., *supra* note 30, at art. 5; *see also* ETHICAL CODES FOR CONCILIATORS arts. 1, 6 (P.R.C.) [hereinafter ETHICAL C. FOR CONCIL.].

³⁶ ETHICAL C. FOR CONCIL., *supra* note 35, at art. 2.

³⁷ *Id.* at art. 3.

³⁸ *Id.* at art. 4.

³⁹ *Id.* at art. 7.

⁴⁰ *Id.* at art. 8.

⁴¹ *Id.* at art. 9.

⁴² *Id.* at art. 10.

⁴³ *Id.* at art. 11.

⁴⁴ *Id.* at art. 12.

in the subsequent arbitration proceedings, unless the other party opposes such appointment.⁴⁵

B. The Conciliation Procedure

The CCPIT/CCOIC Conciliation Centers accept cases on the basis of a conciliation agreement reached between the parties or on one party's application for conciliation with the consent of the other party in the absence of such an agreement.⁴⁶ When applying for conciliation, the party must submit a written Application for Conciliation that contains the names and addresses of the parties, the conciliation agreement, the facts of the case, and evidentiary materials. The applicant may appoint or authorize the Center to appoint one conciliator from the Center's Panel of Conciliators and must pay in advance 50% of the conciliation fee.⁴⁷ After receiving the Application for Conciliation, the Center shall forward to the Respondent one copy of the Application and its annexes immediately. The Respondent must, within 30 days from the date of receipt of the above-mentioned documents, confirm his agreement to conciliation and appoint or authorize the Center to appoint one conciliator, and, at the same time, pay in advance 50% of the conciliation fee.⁴⁸ If the Respondent does not confirm his agreement to conciliation within the time limit, it shall be deemed that he has rejected conciliation.

The two appointed conciliators jointly conciliate the case. The parties may also agree to have a sole conciliator to conciliate the case alone. If the parties have had such agreement but cannot agree on the appointment of the sole conciliator, the Center may appoint the sole conciliator.⁴⁹ The conciliator may conduct conciliation in the manner he deems appropriate,⁵⁰ such as meeting or communicating with the parties.⁵¹ When the conciliator receives information from one party, he may or may not disclose it to the other party; however, if one party requests that the information that he gives

⁴⁵ In practice, it rarely happened that a conciliator was appointed as an arbitrator in subsequent arbitration proceedings if the conciliation failed. However, it really happened that a conciliator was appointed as arbitrator to render an arbitral award in accordance with the contents of the settlement agreement reached through conciliation.

⁴⁶ CONCIL. R., *supra* note 30, at art. 3.

⁴⁷ *Id.* at art. 9.

⁴⁸ *Id.* at art. 10 ("The conciliator shall make a final decision on the proportion of conciliation fees to be borne by the parties, unless otherwise agreed by the parties.").

⁴⁹ *Id.* at art. 12.

⁵⁰ *Id.* at art. 14.

⁵¹ *Id.* at art. 18.

to the conciliator should be kept confidential, the conciliator must respect the party's request. If conciliation fails, the parties "shall not invoke any statements, views, opinions[,] or proposals that have been put forward, proposed, admitted[,] or indicated to be acceptable by the parties or the conciliator in the course of conciliation as grounds for claim or defense in the subsequent arbitration proceedings or litigation proceedings."⁵²

V. CONCILIATION IN LITIGATION PROCESS

A. Before the Establishment of the P.R.C.

The court's practice in the P.R.C. of combining litigation with conciliation developed from the practice of the courts in the Liberated Areas before the establishment of the P.R.C. in 1949.⁵³ In June 1943, the people's government of the Border Region of Shan (Shaanxi)-Gan (Gansu)-Ning (Ningxia) promulgated the *Regulations on Conciliating Civil and Criminal Cases in the Border Region of San-Gan-Ning*, which advocated conciliating disputes and decreasing the litigation of cases.⁵⁴ In accordance with the Regulations, all civil disputes should be conciliated, the criminal offenses (except those involving serious crimes) were capable of being conciliated as well, and conciliation could be applied in any stage of the litigation proceedings, including the proceedings of investigation, decision, appeal, and enforcement.⁵⁵ The famous judicatory style of Ma Xiwu emerged under that circumstance.⁵⁶

⁵² *Id.* at art. 22.

⁵³ The term "Liberated Areas" refers to the areas that were controlled by the Communist Party of China (CPC). The CPC was founded on July 1, 1921, in Shanghai, China. After 28 years of struggle, the CPC finally won victory of "new-democratic revolution" and founded the P.R.C. in 1949. The CPC is the ruling party of mainland China.

⁵⁴ The Border Region was the main area of the Liberated Areas.

⁵⁵ Jiang Shigong, *Falu Yizhi, Gonggong Lingyu yu Hefaxing—Guojia Zhuanxing Zhong de Falu (1840–1980) [Legal Transplantation, Public Realm and Legitimacy—Law of the Country in Transformation (1840–1980)]*, in ERSHI SHIJI DE ZHONGGUO: XUESHU YU SHEHUI—FAXUE JUAN [CHINA IN 20TH CENTURY: ACADEMY AND SOCIETY—VOLUME OF LEGAL SCIENCE] 47–166 (Su Li & He Weifang eds., 2001).

⁵⁶ "The judicatory style of Ma Xiwu: Ma (1898–1962) used to serve as the chief judge of Longdong Prefectural Court in the Shai-Gan-Ning Border Region founded by the Communist Party, and the president of the border region's High Court in late 1930s and 1940s. His style featured integrity circuit trials and on-the-spot settlement of disputes and a combination of adjudication with mediation, which was welcomed by local people." A NEW CHINESE-ENGLISH LAW DICTIONARY 539 (1998).

It should be noted that placing emphasis on conciliation in that special historical period had special historical causes. To begin with, in 1942, the Border Region entered into the most difficult period.⁵⁷ In order to tide over the difficult period, the People's Government of the Border Region fulfilled the policy of "trimming staff and simplifying administration (*Jing bing jian zheng*).” Accordingly, the judicial functionaries were cut down and therefore could not deal with the large number of cases. Conciliating disputes might reduce the pressure of the courts and the judicial cost. Further, conciliation was considered as a method of carrying out democracy. “The advantage of the method (combining conciliation with litigation) is that democracy can be truly realized by the way that cases are decided jointly by the Government and the people; by doing so, the people can understand what is right and what is wrong and learn how to conciliate; and litigation therefore will be reduced in future.”⁵⁸ The judicatory style of *Ma Xiwu* was praised at that time because the style insisted on the principle of democracy, which was summarized as “having faith in the masses and relying on the masses.”⁵⁹ In a sense, conciliation was used at the outset as a political manner.

In addition, in respect of a powerful regime, emphasizing conciliation reflected a concession made by the state law to the private tradition.⁶⁰ The

⁵⁷ In July 1937, Japan launched an all-out aggression against China. The Kuomintang armies started a series of battles that struck relentless blows at the Japanese invaders. In the enemy's rear area, the Eighth Route Army and the New Fourth Army, under the leadership of the CPC, fought against most of the Japanese forces, and almost all the puppet armies under extremely difficult conditions. Both sides fought to a stalemate after 1941. The Japanese forces began to concentrate its superior armor and firepower to aggress the Liberated Areas. At the same time, realizing that he also faced a threat from communist forces of Mao Zedong, Chiang Kai-shek, the leader of Kuomintang, mostly tried to preserve the strength of his army and avoid heavy battle with the Japanese in the hopes of defeating the Communists once the Japanese left. Being attacked from both sides, the Liberated Areas entered into difficult period. See *China in Brief, History: New Democratic Revolution Period (1919-1949)*, at <http://www.china.org.cn/e-china/history/New.htm> (last visited Mar. 11, 2005); see also *Sino-Japanese War*, at <http://www.answers.com/topic/sino-japanese-war&method=6> (last visited Mar. 11, 2005).

⁵⁸ Jiang, *supra* note 55, at 125.

⁵⁹ *Id.*

⁶⁰ Professor Fei Xiaotong pointed out in his famous work, *The Rural China*, which was published in the 1940s, that the traditional Chinese social order structure was the “rule of Li society,” in which Li served as the main form of social norms. The difference between Li and the law is that different forms of force maintain them. The law is carried out by state power; Li is maintained by tradition. See FEI XIAOTONG, *XIANG TU ZHONG GUO [THE RURAL CHINA]* (Ti 1 pan. ed., 1998).

Government of the Communist Party of China was established originally in the border regions that were true rural areas, where the people were deeply influenced or controlled by their own traditions.⁶¹ The legal system of the regime of the Communist Party of China was more or less transplanted from other legal systems.⁶² Two laws, *i.e.*, the state law of the Communist Party regime and the private tradition of the rural community, conflicted with each other because of a lack of common understanding of social order.⁶³ In order to legitimize the state law in the rural community, the new regime had to utilize the traditional resources of the rural community. Conciliation, because it allows private traditions to be used as governing law in adjudicating disputes, was considered as an appropriate concession to the private traditions.⁶⁴

B. After the Establishment of the P.R.C.

The practice of combining litigation with conciliation has been continued after the establishment of the P.R.C.⁶⁵ In 1963, the Supreme Court issued *Several Opinions on the Civil Judicial Work* that suggested the judicatory principles of "investigation and research, on-site trial, and relying mainly on conciliation."⁶⁶ These principles were affirmed in the *Civil Procedure Law of*

⁶¹ According to Professor Fei Xiaotong, tradition is socially accumulated experiences; tradition plays a more important role in a rural society than it does in an urban one. *See id.*

⁶² The ideology was transplanted from the socialist law, and the legal technology and framework were transplanted from civil law. *See Jiang, supra* note 55, at 116.

⁶³ *See id.* at 117. Professor Fei Xiaotong indicated that the "rule of law" and the "rule of Li" take place in two different social statuses. The "rule of Li" is being compliant with tradition. There always exist some social rules for people's relationships with each other in the daily life. One is familiar with these rules from childhood and takes them for granted without questioning their reasonableness. The external rules have been turned into internal habits through education. The force that maintains Li and customs is not from external power, but upon the internal conscience. *See FEI, supra* note 60.

⁶⁴ *See generally* Jiang, *supra* note 55.

⁶⁵ On October 1, 1949, the P.R.C. was formally established, with its national capital at Beijing.

⁶⁶ According to the Constitution and the Organic Law of the People's Courts of 1979 as amended in 1983, China practices a system of courts characterized by "four levels and two instances of trials." The following people's courts exercise the judicial authority of the P.R.C.: local people's courts at various levels, military courts, other special people's courts, and the Supreme People's Courts. The local people's courts are divided into basic people's courts, intermediate people's courts, and higher people's courts.

the P.R.C. (*Trial Implementation*) in 1982. Article 6 of that law provided that the people's court shall emphasize conciliation in judging civil cases; when conciliation fails, the court shall make judgment immediately.⁶⁷ "Masses line" (*qunzhong luxian*)⁶⁸ was still carried out in conciliating cases, which was reflected in Article 99 of the Law: "The people's court may, according to the requirements of the case, invite the relevant units and people to assist in the [conciliation]. The invited units and individuals shall assist the people's court in the [conciliation]."⁶⁹

The principle of emphasizing conciliation directed the courts to deal with a large number of civil cases by this method.⁷⁰ However, such emphasis was virtually tantamount to the practice of mandatory conciliation because some courts pursued high rates of conciliation.⁷¹ To restore the use of other forms of dispute resolution, the *Civil Procedure Law (CPL)* of 1991 amended the principle of conciliation promulgated in the *Civil Procedure Law (Trial Implementation)*, establishing new principles which may be summarized as follows: (a) Conciliation should be on the basis of the parties' voluntary willingness, and parties should not be forced to conciliate their disputes⁷²; (b) conciliation should be conducted only when the court distinguishes between right and wrong on the basis of clear facts⁷³; and (c) if no agreement is reached through conciliation or if either party backs out of the settlement agreement before the conciliation statement is served, the court shall render a judgment without delay.⁷⁴

⁶⁷ CIVIL PROCEDURE LAW art. 9 (P.R.C.) [hereinafter CIV. PROC. L.].

⁶⁸ *I.e.*, having faith in the masses and relying on the masses.

⁶⁹ CIV. PROC. L., *supra* note 67, at art. 87.

⁷⁰ For example, in the years of 1984 and 1985, among the cases wound up by the people's courts, about 85% were resolved through conciliation. See ZHENG TIANXIANG, WORKING REPORT OF THE SUPREME COURT OF THE 3RD SESSION OF THE 6TH NATIONAL PEOPLE'S CONGRESS (1985).

⁷¹ During the processes of trying cases involving economic disputes, the people's courts, in accordance with the principle of emphasizing conciliation regulated in the Civil Procedure Law of the P.R.C. (*Trial Implementation*), conciliated as many cases as possible on the basis of ascertaining the facts, distinguishing right from wrong, and determining liabilities. The People's Court made judgments only if conciliation failed. See ZHENG TIANXIANG, WORKING REPORT OF THE SUPREME COURT OF THE 1ST SESSION OF THE 6TH NATIONAL PEOPLE'S CONGRESS (1983).

⁷² CIV. PROC. L., *supra* note 67, at art. 85.

⁷³ *Id.*

⁷⁴ *Id.* at art. 91.

C. Provisions relating to Conciliation of the CPL

According to the *CPL*, in trying civil cases, the people's court shall distinguish between right and wrong on the basis of the facts being clear and conduct conciliation between the parties on a voluntary and lawful basis. If conciliation fails, judgments shall be rendered without delay.⁷⁵ The parties to an action have the right to request conciliation and must carry out legally-effective conciliation statements.⁷⁶ When a people's court conducts conciliation, a single judge or a collegial panel may preside over it. Conciliation shall be conducted on the spot as much as possible. The court may employ simplified methods to notify the parties concerned and the witnesses to be present at the hearing. It may invite the units or individuals concerned to assist with conciliation, and the units or individuals invited shall render assistance to the court. A conciliation settlement agreement reached between the parties must be made of their own free will and without compulsion, and the contents of the settlement shall not contravene the law. When a settlement agreement is reached by conciliation, the court shall draw up a Conciliation Statement that shall clearly set forth the claims, the facts of the case, and the result of the conciliation. This Statement shall be signed by the judge and the court clerk, sealed by the court, and served on both parties. Once the parties receive it, the Conciliation Statement shall become legally effective.⁷⁷ If one party refuses to execute the court Conciliation Statement, the other party may apply to the court for compulsory enforcement. If no agreement is reached through conciliation, or if either party backs out of the Settlement Agreement before the Conciliation Statement is served, the court shall render a judgment without delay.⁷⁸ If evidence furnished by a party proves that the conciliation violates the principle of voluntary participation, or that the contents of the conciliation agreement violate the law, the party may apply for a retrial. The court shall retry the case if the foregoing proves true after its examination.⁷⁹

The court will not prepare a Conciliation Statement for the following cases: divorce cases in which both parties have become reconciled after conciliation, cases in which an adoptive relationship has been maintained

⁷⁵ *Id.* at arts. 9, 81.

⁷⁶ *Id.* at art. 51.

⁷⁷ *Id.* at arts. 86–89.

⁷⁸ *Id.* at art. 91.

⁷⁹ *Id.* at art. 180.

through conciliation, cases in which the claims can be immediately satisfied, and other cases that do not require a Conciliation Statement.⁸⁰

In general, the court always tries to conciliate the case at the preparation stage of trial. If the initial conciliation fails, the court will try to conciliate the case again at trial, prior to the judgment.⁸¹ Conciliation may also be conducted in dealing with a case on appeal by the court of second instance. If an agreement is reached through conciliation in the appeal process, a Conciliation Statement shall be made and signed by the judicial officers and the court clerk, with the seal of the court affixed to it. After the Conciliation Statement has been served, the original judgment of lower court shall be deemed as set aside.⁸² The court does not conciliate litigation cases that are brought forward against the administrative departments of the Chinese government concerning administrative treatment of economic disputes.⁸³

VI. CONCILIATION IN THE ARBITRATION PROCESS

A. History

Conciliation has been advocated and emphasized in the arbitration procedure in China. Although the initial arbitration system of the P.R.C. was influenced deeply by the model of the arbitration system of the former Soviet Union, the practice of combining arbitration with conciliation originated absolutely from Chinese indigenous cultures and legal traditions.⁸⁴ The China International Economic and Trade Arbitration Commission (CIETAC) created the practice of combining arbitration and conciliation,⁸⁵ which was

⁸⁰ *Id.* at art. 90.

⁸¹ Tang Houzhi, Conciliation in China (Updated), Presentation to the 17th ICCA Conference in Beijing, China (May 16–18, 2004) (on file with author).

⁸² CIV. PROC. L., *supra* note 67, at art. 155.

⁸³ See Tang, *supra* note 81.

⁸⁴ WANG SHENGCHANG, ZHONGCAI YU TIAOJIE XIANGJIEHE DE LILUN YU SHIWU [THE THEORY AND PRACTICE OF COMBINING ARBITRATION WITH CONCILIATION] 112 (2001).

⁸⁵ This was originally done under the name Foreign Trade Arbitration Commission of CCPIT. CIETAC, which was set up in 1954, is the biggest and best-known arbitration commission in the P.R.C. The initial purpose of CIETAC was to settle disputes arising from “contracts and transactions in foreign trade, particularly disputes between foreign firms, companies or other economic organizations on the one hand and Chinese firms, companies or other economic organizations on the other.” Prior to the implementation of the Chinese Arbitration Law, CIETAC had monopolized arbitration cases of foreign-related disputes in mainland China. After five times of revising its rules, CIETAC

deeply influenced by similar practices in Chinese courts.⁸⁶ The first Arbitration Rules of CIETAC, which were modeled on the Rules of the Foreign Trade Arbitration Commission of the former Soviet Union, did not provide for provisions concerning conciliation. They only stipulated that an arbitration case should be dismissed if the parties reached an amicable settlement agreement.⁸⁷ However, CIETAC attempted to conciliate its arbitration cases in its initial practice, even though there were no provisions authorizing conciliation in its Rules.⁸⁸ The statistics show that, in the period from the 1950s to the 1980s, most arbitration cases accepted by CIETAC were concluded by the way of conciliation (*see* Table 1 in appendix). In the period of the 1980s and the early 1990s, CIETAC still enjoyed a certain rate of success with the combination of arbitration and conciliation (*see* Table 2 in appendix).

Conciliation was formally stipulated in the Rules of CIETAC in 1989 in a second set of the CIETAC Rules. Article 37 of the Rules stated that CIETAC and its arbitral tribunals may conciliate the cases accepted by CIETAC. If an amicable settlement was reached by the parties through conciliation, the arbitral tribunal should render an arbitral award in accordance with the contents of the settlement agreement. This was the first provision concerning conciliation in the Rules of CIETAC. Thereafter, CIETAC amended its Rules several times for improving the provisions concerning conciliation.⁸⁹ The current CIETAC Rules (2000) have established a relatively complete system of combining arbitration with conciliation.⁹⁰

expended its scope of cases to the extent that includes not only foreign-related arbitration cases but also domestic arbitration cases in its currently effective arbitration rules, *i.e.*, the CIETAC Rules 2000.

⁸⁶ *See* WANG, *supra* note 84 (referencing interviews with Dong Houzhi and Dong Yougan).

⁸⁷ PROVISIONAL ARBITRATION RULES OF FTAC art. 85 (P.R.C.).

⁸⁸ In the initial stage of CIETAC, the CIETAC arbitral tribunals arbitrated disputes only when conciliation failed. WANG, *supra* note 84, at 293 (referencing record of Tang Houzhi interview).

⁸⁹ The third set of CIETAC Rules was adopted in 1994; the fourth set was adopted in 1995; the fifth set was adopted in 1998. The current CIETAC Rules is the sixth set, which took effect on October 1, 2000. *See* China International Economic and Trade Arbitration Commission (CIETAC), *Introduction*, available at http://www.cietac.org.cn/english/introduction/intro_1.htm (last visited Aug. 22, 2004) [hereinafter CIETAC Rules].

⁹⁰ The matters concerning conciliation are stipulated in Articles 44 to 50 of the Rules. *See id.*, at *Arbitration Rules*, available at <http://www.cietac.org.cn/english/rules/rules.htm> (last visited Aug. 22, 2004).

The practice of combining arbitration with conciliation is not only conducted in foreign-related arbitration, but also in domestic arbitration.⁹¹ Before the Arbitration Law (1994) came into effect, arbitration regulations at that time, such as the *Regulations on Arbitration of Disputes Involving Economic Contracts* and the *Rules of Arbitration of Technology Contract Arbitration Institutions*, contained provisions concerning conciliation. Article 25 of the *Regulations on Economic Contracts Arbitration* even stipulated that the arbitration institution should conduct conciliation first in dealing with arbitration cases.

B. Arbitration Law

The Chinese Arbitration Law (1994) sets forth the modern practice of combining conciliation with arbitration.⁹² According to the law, the parties may reach an amicable settlement by themselves after they submit to arbitration. If they have reached a settlement, they may request the arbitral tribunal to render an arbitral award based on the contents of the settlement agreement, or they may request a dismissal of the arbitration case. The arbitral tribunal *may* carry out conciliation prior to rendering an arbitral award, but if both parties voluntarily seek conciliation, the arbitral tribunal *shall* conciliate the case. The arbitral tribunal shall make a written Conciliation Statement or make an arbitral award in accordance with the settlement agreement if the parties reach a settlement agreement through conciliation. The legal effect of a written Conciliation Statement is equal to that of an arbitral award.⁹³

C. Types of Conciliation in CIETAC Arbitration

The combination of arbitration with conciliation aggregates the advantages of conciliation and arbitration, making the result of conciliation

⁹¹ The arbitration system in the P.R.C. has been divided into two models since it was established. Arbitration in China divides all disputes into domestic or foreign-related disputes, with different procedures for each, and different standards for enforcement and judicial review of those awards. The division has been called by Chinese academics as the "dual-track" system (*Shuang Gui Zhi*).

⁹² The Chinese Arbitration Law was adopted by the 9th Session of the Standing Committee of the 8th National People's Congress of the P.R.C. on August 31, 1994, and came into force on September 1, 1995. This is the first comprehensive legislation on the subject of arbitration in mainland China, which was praised as a "milestone in Chinese arbitration history" and "a major milestone in the development of China's legal system."

⁹³ CHINESE ARBITRATION LAW art. 49-52 (P.R.C.) [hereinafter ARB. LAW].

enforceable as an arbitral award.⁹⁴ Analyzing the stipulations of the CIETAC Rules with respect to combining arbitration with conciliation and observing the CIETAC practice, the combined method may be summarized by the following categories: joint conciliation, conciliation without the involvement of the arbitral tribunal, conciliation conducted by the arbitral tribunal, and conciliation before the arbitration process.

1. *Joint Conciliation*

Joint conciliation was established in 1975 by an agreement between CIETAC and the American Arbitration Association (AAA).⁹⁵ According to the agreement, in a dispute arising from a contract between a Chinese party and an American party in which the parties failed to reach a settlement by amicable consultation, the Chinese party may request CIETAC for conciliation, and the American party may request the AAA for conciliation. The two arbitration institutions each then appoint conciliator(s) for the purpose of resolving the dispute. The appointed conciliators then jointly conciliate the dispute. If the joint conciliation fails, the parties still have a chance to submit to arbitration in accordance with the arbitration agreement between them.⁹⁶

2. *Conciliation Without Involvement of the Arbitral Tribunal*

⁹⁴ Professor Tang Houzhi summarized the advantages of the combination of arbitration with conciliation as follows: (a) it could preserve the effectiveness of an individual conciliation process; (b) it could save the energy, time, and money of the disputants; (c) the result, *i.e.*, the arbitral award rendered in accordance with the conciliation statement, could be enforced by the court; and (d) the combination could minimize the deterioration in relationships between the disputants, sometimes providing a forum for new and more creative working relationships to be established. *See* WANG, *supra* note 84, at 81–82.

⁹⁵ In January 1975, the AAA was invited to visit China, and reached an oral agreement with CIETAC (Foreign Trade Arbitration Commission of CCPIT at that time) in solving the Sino-American trade disputes by way of “joint conciliation.”

⁹⁶ In 1977, CIETAC, jointly with the AAA, had, for the first time, successfully conciliated the dispute of cotton trade between China National Textiles Import and Export Corporation and American Polands Cotton Cooperation Firm. This complicated case related to a dispute of \$2.4 million. After the case was satisfactorily solved, Mr. David Ding, head of the U.S. Liaison Office in China, held a cocktail party for this successful settlement. He said, “I am very glad to see this kind of settlement for dispute.”

According to the CIETAC Rules, the parties to an arbitration case may reach an amicable settlement by themselves during the arbitration proceedings without involvement of the arbitral tribunal. In such case, the parties may request to dismiss the arbitration case, or they may request the arbitral tribunal to conclude the case by rendering an arbitral award in accordance with the contents of their amicable settlement.⁹⁷

3. Conciliation Conducted by the Arbitral Tribunal

The arbitral tribunal may conciliate the case under its cognizance in the arbitration process if the parties to the arbitration so agree.⁹⁸ The arbitral tribunal has power to conciliate the case in the manner it considers appropriate.⁹⁹ It shall terminate the conciliation and continue the arbitration process whenever one party so requests or it believes that the conciliation will yield no result.¹⁰⁰ If the parties through conciliation reach an amicable settlement, the arbitral tribunal should render an arbitral award in accordance with the contents of the settlement or dismiss the case on the request of the parties.¹⁰¹

4. Conciliation Conducted before the Arbitration Process

In its 2000 Rules, CIETAC introduced a new form of combining arbitration with conciliation. According to Article 44 of the Rules, if the parties reach a settlement agreement without the involvement of CIETAC, either party may request CIETAC, based on an arbitration agreement between them, "to appoint a sole arbitrator to render an arbitral award in accordance with the contents of the settlement agreement."¹⁰²

⁹⁷ CIETAC Rules, *supra* note 89, at art. 44.

⁹⁸ *Id.* at art. 45.

⁹⁹ *Id.* at art. 46. The tribunal may conduct the conciliation proceedings in three ways: (1) by consulting with both parties together; (2) by consulting with each of the parties separately; and (3) by having the parties consult with each other by themselves. The three ways can be used alternatively. See Tang, *supra* note 81.

¹⁰⁰ CIETAC Rules, *supra* note 89, at art. 47.

¹⁰¹ *Id.* at art. 49.

¹⁰² There still exists some debate over the meaning of this provision. Supposing the arbitration agreement reached after the settlement agreement is purely to make the settlement enforceable, then the validity of the arbitration agreement may be questioned because the parties reached a settlement agreement and the differences or disputes between them no longer exist. The arbitration agreement, therefore, is an agreement between parties without differences or disputes. Is this a valid arbitration agreement

D. Contents and Principles of the Combination

The main features of the combination of arbitration with conciliation include: (a) an arbitral tribunal may play the role of a conciliator in the midst of arbitration proceedings¹⁰³; (b) the arbitral tribunal has the power to decide the manner of conciliation since the process lacks formal, detailed procedural rules¹⁰⁴; (c) the arbitral tribunal may render an arbitral award in accordance with the contents of the settlement agreement reached by the parties during the course of the conciliation proceedings¹⁰⁵; (d) if the conciliation fails, the arbitral tribunal may terminate the conciliation process and continue the arbitration proceedings¹⁰⁶; and (e) if the conciliation fails, any statement, opinion, view, or proposal made by the parties during the process of conciliation shall not be invoked as grounds for any claim, defense, or

under the New York Convention, which defines an arbitration agreement as an agreement in writing "under which the parties undertake to submit to arbitration all or any differences?" Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. II, § 1, 21 U.S.T. 2517, 330 U.N.T.S. 3, 38. If the answer is negative, then the enforceability of the arbitral award may be questionable and the value and purpose of the combination may be futile.

¹⁰³ "The arbitration tribunal may carry out conciliation prior to giving an arbitration award. The arbitration tribunal shall conduct conciliation if both parties voluntarily seek conciliation" ARB. LAW, *supra* note 93, at art. 51. "If both parties have a desire for conciliation or one party so desires and the other party agrees to it when consulted by the arbitration tribunal, the arbitration tribunal may conciliate the case under its cognizance in the process of arbitration." *Id.* at art. 45.

¹⁰⁴ "The arbitration tribunal may conciliate cases in the manner it considers appropriate." *Id.* at art. 46.

¹⁰⁵ "If conciliation leads to a settlement agreement, the arbitration tribunal shall make a written conciliation statement or make an arbitration award in accordance with the result of the settlement agreement. A written conciliation statement and an arbitration award shall have equal legal effect." ARB. LAW, *supra* note 93, at art. 51, para. 2. "The parties shall sign a settlement agreement in writing when an amicable settlement is reached through conciliation conducted by the arbitration tribunal, and the arbitration tribunal will close the case by making an arbitration award in accordance with the contents of the settlement agreement unless otherwise agreed by the parties." CIETAC Rules, *supra* note 89, at art. 49.

¹⁰⁶ "If conciliation is unsuccessful, an arbitration award shall be made promptly." ARB. LAW, *supra* note 93, at art. 51. "The arbitration tribunal shall terminate conciliation and continue the arbitration proceedings when one of the parties requests a termination of conciliation or when the arbitration tribunal believes that further effects to mediate will be futile." CIETAC Rules, *supra* note 89, at art. 47.

counterclaim in subsequent arbitration, judicial, or any other types of proceedings.¹⁰⁷

In the practices set forth by CIETAC, three fundamental principles have been strictly followed in the process of combining arbitration with conciliation. First, conciliation is an option for the parties and not a required mandatory procedure of arbitration. Second, conciliation must be based upon the absolute free will of the parties. Third, conciliation must be conducted with the purpose of “establishing the facts, distinguishing right from wrong, and ensuring fairness and reasonableness.”¹⁰⁸

VII. REASONS FOR EMPHASIZING CONCILIATION

A. *Traditional Culture and the Traditional Legal and Social System*

The reasons for emphasizing conciliation should be attributed to traditional Chinese culture and the traditional legal and social system, which provide fertile grounds for the birth of the combination of arbitration with conciliation. In traditional Chinese culture, the main concepts are praise of harmony (*he wei gui*), moderation in all things (*zhong yong*), concession or yielding (*reng*), and cease of litigation (*xi song*).¹⁰⁹ All the principles of Confucianism¹¹⁰ and Taoism¹¹¹ promoted a culture in which litigation was

¹⁰⁷ “Should conciliation fail, any statement, opinion, view or proposal which has been made, raised, put forward, acknowledged, accepted or rejected by either party or by the arbitration tribunal in the process of conciliation shall not be invoked as grounds for any claim, defense and/or counterclaim in the subsequent arbitration proceedings, judicial proceedings or any other proceedings.” *Id.* at art. 50.

¹⁰⁸ Tang Houzhi, *International Commercial Arbitration and Conciliation in China*, in YEARBOOK OF CHINA INTERNATIONAL COMMERCIAL ARBITRATION 98 (1992); WANG, *supra* note 84, at 88–91, 292–305 (referencing interviews with Tang Houzhi and Dong Yougan, separately).

¹⁰⁹ See WANG, *supra* note 84, at 103–11; Bobby K.Y. Wong, *Chinese Law: Traditional Chinese Philosophy and Dispute Resolution*, 30 HONG KONG L.J. 304, 307–12 (2000).

¹¹⁰ Regarding Confucian Philosophy, see generally SHU-HSIEN LIU, UNDERSTANDING CONFUCIAN PHILOSOPHY: CLASSICAL AND SUNG-MING (1998); THE FOUR BOOKS: CONFUCIAN ANALECTS, THE GREAT LEARNING, THE DOCTRINE OF THE MEAN, AND THE WORKS OF MENCIUS (James Legge trans., 1966).

¹¹¹ “Taoism is a tradition that has . . . shaped Chinese life for more than 2,000 years. Taoism places emphasis upon spontaneity or freedom from social-cultural manipulation through institutions, language and cultural practices.” For more discussion, see Wikipedia: The Free Encyclopedia, *Taoism*, at <http://en.wikipedia.org/wiki/Taoism> (last visited Aug. 22, 2004).

considered the last resort because it signified the breakdown of social harmony. This deeply influenced the method of dispute resolution selected by Chinese.

The Chinese historical economy was mainly a small-scale peasant economy without complicated civil relations.¹¹² Civil disputes primarily concerned matters of marriage, land, or houses, and were often raised between acquaintances in a small and closed society.¹¹³ Disputants therefore preferred to settle their disputes by conciliation in order to uphold a harmonious community.

The Chinese traditional legal system promoted the use of conciliation as well. Law in ancient China, which was administered by magistrates who had no special legal training, was not formally differentiated from exercises of state power.¹¹⁴ Formal law and legal processes were principally concerned with punishment and emphasized substantive justice, which meant that the outcomes of cases had to meet the requirements of both the law and Confucian morality.¹¹⁵ In the ancient Chinese law, the threshold for criminal offenses was extremely low, and there was no clear distinction between criminal and civil cases; thus, many disputes, which are civil by modern standards, were classified as criminal.¹¹⁶ Criminal penalties were heavy and were imposed not only for criminal offenses, but also in certain cases that were civil in nature.¹¹⁷ The fact that criminal penalties were applied to civil disputes made people more reluctant to go to the court for adjudication of civil disputes. Conciliation afforded people "a method of terminating disputes that was socially acceptable in the light of the Confucian ethic and group mores."¹¹⁸ Thus, in a sense, conciliation in the Chinese traditional legal system was not an alternative, but rather an integral part of the legal system.¹¹⁹

¹¹² Regarding the Chinese traditional social system, see generally FEI, *supra* note 60.

¹¹³ *Id.*

¹¹⁴ LUBMAN, *supra* note 2, at 23.

¹¹⁵ *Id.*

¹¹⁶ ZHONGGUO FAZHISHI JIAOCHENG [A COURSE IN THE HISTORY OF CHINESE LEGALITY] (Xiao Yongqing ed., 1987). *E.g.*, according to the Laws of Tang Dynasty (618–907), if one received the other's betrothal gift, but broke off the engagement, he/she would be punished with flogging. *See id.* at 173–74.

¹¹⁷ *Id.*

¹¹⁸ LUBMAN, *supra* note 2, at 26.

¹¹⁹ Regarding Chinese traditional practice and thoughts of conciliation, see generally ZHANG JINFAN, ZHONGGUO MINSHI SUSONG ZHIDU SHI [HISTORY OF CHINESE CIVIL LITIGATION SYSTEM] (1999) and WANG, *supra* note 84.

B. Reasons for Emphasizing Conciliation in Arbitration

Influenced by the practice of combining litigation with conciliation in the trial of civil cases, CIETAC has empowered its arbitral tribunals to conciliate arbitration cases since its establishment.¹²⁰ The CIETAC practice was attributed to special historical reasons, which may differ from the reasons for the popularity of conciliation in other countries.¹²¹

The modern commercial arbitration process is a product of the market-oriented economy. The market economy requires the modern commercial arbitration process to pay great attention to the principles of party autonomy and freedom of contract. It also requires commercial arbitration to be independent from the national government and court system. For the purpose of meeting those requirements, the modern commercial arbitration process has gradually embraced the characteristics of party autonomy, flexibility, confidentiality, and finality.

However, the arbitration system in the P.R.C. emerged and developed in the environment of a planned-oriented economy. After the establishment of the P.R.C., China implemented a centrally-controlled economic system by abolishing free markets and nationalizing the private companies as state-owned enterprises.¹²² Under such an economic system, there were no independent market forces because enterprises had no rights to dispose of their property, since the property belonged to the State. Additionally, there were no independent market operations because all economic activities were handled by the State.

In the 1980s, China felt the pains that resulted from its planned economy, and therefore began to reform. In 1978, China adopted an "open door" policy, centering on economic reforms that aimed to utilize market mechanisms and foreign resources to bolster the growth and modernization of economy.¹²³ Arbitration, which was regarded as a method of improving the environment for foreign investment, began to play a more important role in the "socialist market economy" and in "socialism with Chinese

¹²⁰ See discussion *supra* Part VI.

¹²¹ In modern legal system, conciliation is considered as an alternative method to arbitration and litigation for avoiding the disadvantages of arbitration and litigation. Regarding modern conciliation/mediation, see CHRISTIAN BÜHRING-UHLE, *ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS* 272-303 (1996).

¹²² In the early 1950s, the Chinese government began to collectivize agriculture. Preliminary collectivization was 90% completed by the end of 1956. In addition, the government nationalized banking, industry, and trade. Private enterprise in mainland China was virtually abolished.

¹²³ See *Chinese Economic Reform*, *supra* note 20.

characteristics.”¹²⁴ Arbitration was first defined as a method of dispute resolution in the first foreign-related law, *The Law of the People’s Republic of China on Chinese-Foreign Equity Joint Ventures* in 1979. Thereafter, more laws began to contain arbitration provisions.¹²⁵

CIETAC was established in 1954 in accordance with the *Decision of the Government Administration Council of the Central People’s Government Concerning the Establishment of A Foreign Trade Arbitration Commission within the China Council for the Promotion of International Trade (CCPIT)*.¹²⁶ Since the National People’s Congress—the legislative organization of the P.R.C.—was not established at that time,¹²⁷ the decisions of the Government Administration Council in a sense played the role of legislation. Thus, the 1954 decision was regarded as the first legislation

¹²⁴ The development of the economic system with public ownership playing a dominant role and diverse forms of ownership developing side by side is a basic characteristic of the socialist economic system at the preliminary stage. This is decided by the quality of socialism and the national situation in preliminary stage: first, China, as a socialist country, should persist in public ownership as the base of the socialist economy; second, China, as in its preliminary stage, should develop diverse forms of ownership on condition that the public ownership plays a dominant role; third, all forms of ownership compliant with “Three Represents” are serving socialism. *Socialist Market Economic System*, at http://english.mofcom.gov.cn/article/200406/20040600239133_1.xml (last visited Aug. 22, 2004).

¹²⁵ E.g., LAW OF THE PEOPLE’S REPUBLIC OF CHINA ON CHINESE-FOREIGN EQUITY JOINT VENTURES art. 14 (P.R.C.); THE REGULATIONS OF THE P.R.C. ON THE EXPLOITATION OF OFFSHORE PETROLEUM RESOURCES IN CO-OPERATION WITH FOREIGN VENTURES art. 27 (P.R.C.); IMPLEMENTING REGULATIONS OF THE LAW OF THE PEOPLES’S REPUBLIC OF CHINA ON CHINESE-FOREIGN EQUITY JOINT VENTURES (P.R.C.); THE REGULATIONS OF THE P.R.C. ON EXPLOITATION OF ONSHORE PETROLEUM RESOURCES IN CO-OPERATION WITH FOREIGN ENTERPRISES art. 26 (P.R.C.); THE FOREIGN ECONOMIC CONTRACT LAW art. 20, 31, 37–39 (P.R.C.); THE CIVIL PROCEDURE LAW art. 111, 140, 217, 257, 260, 261 (P.R.C.); THE CHINESE LAW ON CHINESE-FOREIGN CO-OPERATIVE JOINT VENTURES (P.R.C.); THE CONTRACT LAW art. 54, 96, 114, 128, 129 (P.R.C.). These sources are available at <http://www.isinolaw.com>.

¹²⁶ DECISION OF THE GOVERNMENT ADMINISTRATION COUNCIL OF THE CENTRAL PEOPLE’S GOVERNMENT CONCERNING THE ESTABLISHMENT OF A FOREIGN TRADE ARBITRATION COMMISSION WITH THE CHINA COUNCIL FOR THE PROMOTION OF INTERNATIONAL TRADE art. 1 (P.R.C.), available at http://www.novexcn.com/for_trade_arbitrat_comissi.html (last visited Aug. 22, 2004) [hereinafter DECISION 1954].

¹²⁷ The legislation organization of the P.R.C. is the National People’s Congress, which was established in 1954.

concerning arbitration in the P.R.C.¹²⁸ Establishing CIETAC in CCPIT was for the purpose of settling disputes arising in foreign trade.¹²⁹ Disputes arising from domestic trade were settled by administrative arbitration because those disputes were among enterprises of “socialist public ownership” (*Shehui Zhuyi Gongyouzhi*).¹³⁰ CIETAC altered its name twice, in 1980 and 1988, adding “economic” and changing “foreign” to “international,” respectively.¹³¹ In 1994, the Chinese Arbitration Law was

¹²⁸ WANG, *supra* note 84, at 111–12.

¹²⁹ See DECISION 1954, *supra* note 126. The Decision decided that the Arbitration Commission (the predecessor of CIETAC) exercised jurisdiction for the arbitration of disputes in foreign trade in accordance with the relevant contracts, agreements, and/or other documents concluded between the disputing parties.

¹³⁰ The Chinese domestic economic contract arbitration system was established in the early part of the 1950s, and had undergone three stages. First, disputes were generally settled through arbitration, not through litigation (*zhi cai bu shen*, 1950s to 1970s). In this period, the local divisions of the State Economic and Trade Commission, an executive organization of the Government, arbitrated all disputes arising from economic contracts. Courts did not accept cases with respect to economic contract disputes. Second, the system of two-tiers, arbitration and litigation (*liang cai liang shen*), was established, and lasted from the 1970s to 1983. In this period, disputes had to be arbitrated before resorting to litigation. Under this system, the parties to an economic contract might submit disputes arising from a contract to the administrative authorities for arbitration. If one party was dissatisfied with the result of the arbitration, it might apply to the high-level administrative authorities for reconsideration of the arbitral award. If the party was dissatisfied with the result of the reconsideration, it might bring an action to the court. Because decisions from the Chinese Court of Second Instance are final, the dispute resolution system had to experience four tiers, *i.e.*, two arbitrations and two instances. Finally, the system of arbitration and litigation (*yi cai liang shen*) evolved from 1983 to 1995. In this stage, arbitration was not a compulsory proceeding required before court proceedings could begin. Parties could choose arbitration or litigation. The arbitration administrative body was the State Administration for Industry and Commerce and its local divisions. This system replaced the stage of reconsideration for arbitration awards. Parties were not allowed to apply for reconsideration but they still were entitled appeal to the court system. Wang Wenying, *Arbitral Power in the People's Republic of China: Reality and Reform* (2004) (unpublished SJD dissertation, University of Hong Kong) (on file with the author).

¹³¹ STATE COUNCIL'S NOTICE CONCERNING THE CONVERSION OF THE FOREIGN TRADE ARBITRATION COMMISSION INTO THE FOREIGN ECONOMIC AND TRADE ARBITRATION COMMISSION (P.R.C. 1980), available at <http://www.86148.com/englishlaw/shownews.asp?id=260> (last visited Aug. 22, 2004); THE STATE COUNCIL'S OFFICIAL REPLY CONCERNING THE RENAMING OF THE FOREIGN ECONOMIC AND TRADE ARBITRATION COMMISSION AS THE CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION AND THE AMENDMENT OF ITS

promulgated for the purpose of governing China's arbitration affairs, abolishing domestic administrative arbitration and establishing an independent arbitration system.¹³²

Before the 1980s, there were few laws in China that could be applied to commercial disputes. In such a legal vacuum, the arbitral tribunals could only decide cases in accordance with the principle of fairness and reasonableness or encourage the parties to resolve their disputes by themselves (reaching settlements in conciliation conducted by the arbitral tribunal). Furthermore, the arbitration cases submitted before CIETAC in its early stages were relatively easy to be conciliated. The simplicity of the cases, the relatively stable business relations, and the small amounts of claims were the other reasons for the high rate of success of conciliation.¹³³ Moreover, it is important to note that China was not a contracting state to the New York Convention until 1987. Prior to that time, the CIETAC arbitral awards could not be recognized and enforced by foreign courts directly in accordance with the Convention. This drawback of CIETAC arbitral awards resulted in the parties' preference for conciliation.

VIII. CONCLUSION

Conciliation, in its various forms, plays an important role in resolving disputes in China. However, the success of conciliation may be constrained by several factors. It should only be initiated with the consent of the parties. If the parties are not willing to conciliate their disputes, they must resort to other forms of dispute resolution. Even if the parties agree to conciliate, the success of conciliation still depends on concessions made by the parties. The concessions of the parties are subject to the merits of their case and

ARBITRATION RULES (P.R.C. 1988), available at <http://www.86148.com/englishlaw/shownews.asp?id=248> (last visited Aug. 22, 2004).

¹³² The Chinese Arbitration Law was adopted by the 9th Session of the Standing Committee of the 8th National People's Congress of the People's Republic of China on August 31, 1994, and came into force on September 1, 1995. This was the first comprehensive legislation on the subject of arbitration in mainland China, which was praised as a "milestone in Chinese arbitration history" and "a major milestone in the development of China's legal system," and was welcomed widely in China, as well as outside the P.R.C. Further discussion can be found in Wang, *supra* note 130.

¹³³ Before the 1980s, a few state-owned foreign trade companies monopolized the foreign trade business. Their trade partners usually came from either socialist or third world countries. Only a few companies of western countries had business relations with Chinese companies. The monopoly of foreign trade resulted in the stability of partners in the foreign trade. See WANG, *supra* note 84, at 312 (referencing an interview with Cui Bingqun).

expectations of the results of other dispute resolution methods, such as arbitration or litigation. The quality, authority, and skill of the conciliator are also crucial to the success of conciliation.¹³⁴ Thus, the success of this method is not solely determined by the emphasis on conciliation in the laws or rules. Even though the Arbitration Law confirmed the practice of combining conciliation with arbitration and CIETAC Rules perfected the provisions relating to the practice, the rate of successfully conciliated cases by CIETAC has substantially declined from more than 70% in 1986 to 17% in 1995 and 27% in 2000.¹³⁵

There are advantages of combining conciliation with the other dispute resolution methods, as it permits a single combined process to enjoy the distinct advantages of its two component parts. However, overemphasizing conciliation in arbitration or litigation proceedings may bring a negative influence to the dispute resolution process. Lessons may be drawn from the courts' experience and use of conciliation. In past years, the courts experienced a stage of overemphasizing conciliation. During that stage, the courts conciliated all civil cases, first as a mandatory process, and pursued a policy of "relying mainly on conciliation while making adjudication subsidiary."¹³⁶ This resulted in numerous negative consequences as the courts lost their professionalism, "the line of messes" became a common judicial principle, and administrative support to the courts became necessary, since the success of conciliation depended on the assistance of administrative units and individuals.¹³⁷ Many practitioners and academics have realized the dangers of overemphasis on conciliation. They advocate reform of the system of combining litigation with conciliation, and seek the separation of the two processes for the purpose of maintaining the judicial independence. Practitioners and academics are also calling on the formulation of a conciliation law for the purpose of regulating all forms of China's

¹³⁴ WANG, *supra* note 84, at 291–339 (referencing records of interviews of CIETAC arbitrators).

¹³⁵ However, some domestic arbitration commissions in China still strive for a high success rate in conciliating arbitration cases. For example, some arbitration commissions laid down targets of more than 50% in their work plan for 2002; some arbitration Commissions' targets are even higher, at more than 70%.

¹³⁶ Jiang, *supra* note 55, at 131.

¹³⁷ Regarding the cases, see *id.*; SU LI, SONG FA XIA XIANG—ZHONGGUO JICENG SIFA ZHIDU YANJUE [DELIVERING LAW TO VILLAGES—RESEARCH ON CHINESE BASIC LEVEL LEGAL SYSTEM] 131–36 (2000).

conciliation.¹³⁸ It is believed that China's conciliation will be institutionalized and standardized in the future.

¹³⁸ See, e.g., Li Hao, *Minshi Shenpan zhong de Tiaoshen Fenli* [Separation of the Conciliation from Litigation], in LEGAL RESEARCH 4 (1996); Pan Duwen, *Wouguo Susong Tiaojie Zhitu de Fansi yu Wanshan* [Reviewing and Perfecting the System of Conciliation in Litigation of Our Country], in RESEARCH ON COMMERCIAL LAW 6 (1998); Tan Zhaoping, *Susong Hejie—Fayuan Tiaojie Zhidu Wanshan zhi Duice* [Settlement in Litigation—Measures of Perfecting the System of Conciliation in Court], in JUDICIAL PRACTICE 8 (1998); Huozhi, *supra* note 81.

Appendix

Table 1: Statistics of Arbitration Cases
Handled by CIETAC (Beijing Headquarter) (1953–1984)
(Source: CIETAC)

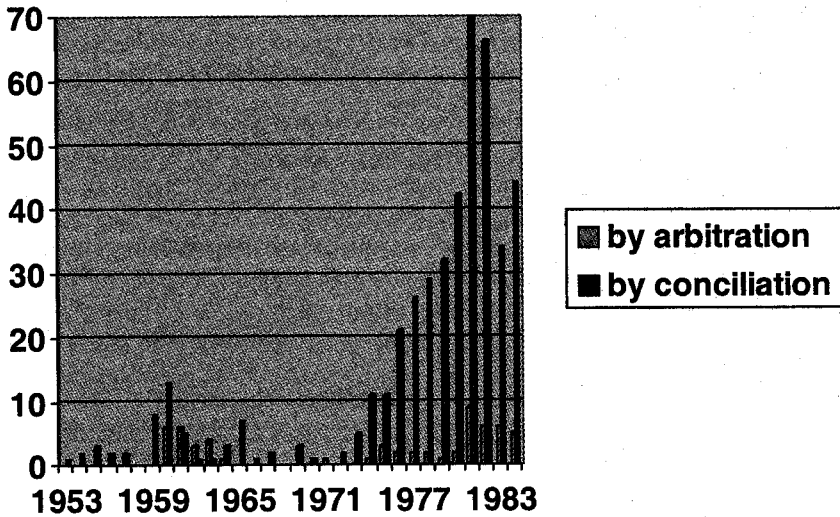


Table 2: Statistics of Arbitration Cases
Handled by CIETAC (Beijing Headquarters) (1986–2000)

| Year | Total of concluded cases (T) | Cases concluded by conciliation (C) | Cases withdrawn by parties (D) | Ratio between T and (C+D) (%) |
|------|------------------------------|-------------------------------------|--------------------------------|-------------------------------|
| 1986 | 7 | 4 | 3 | 100 |
| 1987 | 49 | 3 | 11 | 28.57 |
| 1988 | 117 | 1 | 41 | 35.9 |
| 1989 | 183 | 4 | 57 | 33.33 |
| 1990 | 186 | 4 | 46 | 26.88 |
| 1991 | 211 | 1 | 48 | 23.22 |
| 1992 | 203 | 5 | 48 | 26.11 |
| 1993 | 389 | 11 | 30 | 10.54 |
| 1994 | 600 | 32 | 86 | 19.67 |
| 1995 | 660 | 43 | 73 | 17.58 |
| 1996 | 543 | 27 | 85 | 20.63 |
| 1997 | 490 | 28 | 78 | 21.63 |
| 1998 | 451 | 27 | 73 | 22.17 |
| 1999 | 427 | 27 | 71 | 22.95 |
| 2000 | 410 | 38 | 74 | 27.32 |

